

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

CATHY WILSON :  
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 V. : C.A. No. 01-365T  
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 BURLINGTON COAT FACTORY :  
 WAREHOUSE OF WOONSOCKET, INC., :  
 ANDY RICARD, alias, ROLANDE E.:  
 LEFEBVRE, alias, JOHN O'HARE, :  
 alias, MARCIN ORYBKIEWICZ, :  
 alias, DANDI CHOEN, alias, :  
 MATT ZOE, alias :

REPORT AND RECOMMENDATION

Robert W. Lovegreen, United States Magistrate Judge

Background

Now before this court is defendants' motion for summary judgment pursuant to Fed.R.Civ.P. 56.<sup>1</sup> Plaintiff Cathy Wilson ("Wilson") alleges four counts of employment and racial discrimination in her second amended complaint. Plaintiff alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; 42 U.S.C. § 1981; the Rhode Island Fair Employment Practices Act ("FEPA"), R.I. Gen. L. § 28-5-1 et seq.; and the Rhode Island Civil Rights Act, R.I. Gen. L. § 42-112-1 et seq. Defendants submitted their motion for summary judgment and corresponding memorandum of law on

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<sup>1</sup> At oral argument, plaintiff noted that a dismissal stipulation would be filed as to all defendants except Burlington, Ricard, and Lefebvre.

August 30, 2002. Wilson objected to defendants' motion and submitted her memorandum of law on September 24, 2002. This matter has been referred to a magistrate judge for preliminary review, findings, and recommended disposition. 28 U.S.C. § 636(b)(1)(B); Local Rule of Court 32(c). A hearing was held on January 10, 2003. After examining the memoranda submitted, listening to the arguments of counsel and conducting my own independent research, I recommend denying defendants' motion as it relates to a hostile work environment, employer liability, and retaliation. I also recommend that defendants' motion be granted as to the constructive discharge issue.

## I. Statement of Facts

Wilson, an African American female, began working as a sales associate for Burlington's Woonsocket, Rhode Island location on October 17, 1998. Throughout her brief tenure at Burlington, Wilson alleges that she was subjected to several instances of racial discrimination. Wilson then requested, and was granted, a ten-week medical leave of absence beginning March 23, 1999. As Wilson's medical leave was about to expire, Burlington wrote to her to ask whether or not she would return to work. Wilson responded in the negative. Burlington requested that Wilson submit her resignation in writing, which she did, effective June 1, 1999. In all, Wilson actually worked at Burlington for approximately four months. Andy Ricard ("Ricard") was Burlington's district manager and Rolande Lefebvre ("Lefebvre") was the assistant operations manager, and Wilson's direct supervisor, at the Woonsocket location during the relevant time period.

## II. Plaintiff's Allegations and Burlington's Response

Wilson has claimed several incidents of alleged discrimination due to her race. First, plaintiff alleges that in December 1998, another male sales associate, Marcin Orybkiewicz ("Orybkiewicz"), approached her and said that "she slept with monkeys" and "should go back to Africa." Wilson reported these actions to Lefebvre the next day and told her that the comments "upset" her.<sup>2</sup> Wilson then met with Lefebvre

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<sup>2</sup> There is a dispute as to whether Wilson reported the incident to Lefebvre herself or Lefebvre heard it from another employee. The truth to that matter, however, is immaterial to this motion because

to discuss the problem. Burlington claims that Lefebvre thereafter monitored the interactions between Wilson and Orybkiewicz, but Burlington took no disciplinary action.

Second, plaintiff contends that Matthew Deroy, a male co-employee, made racial remarks to her. Wilson alleges that Deroy was setting up a sales display involving stuffed animals, including monkeys. Plaintiff asked Deroy why he put monkeys in the display and he allegedly replied that he was "trying to make Otis feel comfortable." The Otis to which Deroy referred to was Otis Porritt, a male African American employee. The plaintiff "maintains that the display was racially-motivated and directed at her as an African-American." Pltf.'s Mem. at 5.

Third, plaintiff alleges that Orybkiewicz, in January 1999, made his second racially harassing comment to her by asking her if she "ordered something from the nigger network." A store manager was made aware of this comment and Orybkiewicz was fired that day. Fourth, also in January 1999, plaintiff alleges that a supervisor approached her while she was training a new employee and told the new employee not to listen to Wilson because "she didn't know what she was doing" and did "everything wrong." Plaintiff alleges that those comments "were due to Plaintiff's race and/or color." Id. at 6.

Fifth, Wilson alleges that she was harassed because of her race when another female sales associate, Heidi Marchand, told Wilson that she had overheard two other employees, Dandi Cohen and Jennifer Detri, conspiring to "write up" Wilson. Plaintiff contends that she reported these comments to Lefebvre and believed that the "conspiracy" "was based on her race and/or color or because she complained about discrimination in the workplace." Id.

Sixth, and lastly, Wilson alleges an act of racial discrimination after being transferred to the receiving department.<sup>3</sup> While in the receiving department, Wilson

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Burlington had notice of the allegation either way.

<sup>3</sup> Wilson was transferred to the receiving department just a few weeks before her medical leave commenced. When the transfer was initially offered to her, Wilson refused it. However, Wilson

complained to another employee about not feeling well. The other employee told Wilson to "get over it." Plaintiff contends that this comment was racially motivated. Therefore, plaintiff alleges that Burlington's failure to implement remedial measures to address the discriminatory workplace environment caused plaintiff's constructive discharge.

### III. Summary Judgment Standard

A party shall be entitled to a summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When determining a motion for summary judgment, the court reviews the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor. Cadle Co. v. Hayes, 116 F.3d 957, 959 (1st Cir. 1997).

Summary judgment involves shifting burdens between the moving and the nonmoving parties. Initially, the burden requires the moving party to aver "an absence of evidence to support the nonmoving party's case." Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). Once the moving party meets this burden, the onus falls upon the nonmoving party, who must oppose the motion by presenting facts that show that a genuine "trialworthy issue remains." Cadle, 116 F.3d at 960 (citing National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995); Maldonado-Denis v. Castillo Rodriguez, 23 F.3d 576, 581 (1st Cir. 1995)). An issue of fact is "genuine" if it "may reasonably be resolved in favor of either party." Id. (citing Maldonado-Denis, 23 F.3d at 581).

To oppose the motion successfully, the nonmoving party may not rest upon "conclusory allegations, improbable inferences, [or] unsupported speculation." Id. (citing Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990)). Moreover, the "evidence illustrating the factual

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apparently changed her mind and then actually pursued the transfer by contacting Lefebvre.

controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve at an ensuing trial." Id. (citing Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989)). Therefore, to defeat a properly supported motion for summary judgment, the nonmoving party must establish a trial-worthy issue by presenting "enough competent evidence to enable a finding favorable to the nonmoving party." Goldman v. First Nat'l Bank, 985 F.2d 1113, 1116 (1st Cir. 1993)(citing Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1985)).

#### IV. Analysis

##### A. Hostile Work Environment

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his ... employment, because of ... race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).<sup>4</sup> In order for work conditions "to be actionable under the statute, ... [the] objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998). Under this standard, defendants first argue that Wilson was not subject to a hostile work environment as a matter of law. See Defs.' Mem. at 7-11; Defs.' Reply Mem. at

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<sup>4</sup> The four counts contained in plaintiff's second amended complaint receive near identical analysis. See Russell v. Enter. Rent-A-Car Co. of R.I., 160 F. Supp. 2d 239, 265 (D.R.I. 2001) ("FEPA is Rhode Island's analog to Title VII and the Rhode Island Supreme Court has applied the analytical framework of federal Title VII cases to those brought under FEPA.") (citations omitted); see also Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 12-17 (1st Cir. 1999) (applying the Title VII "hostile work environment" analysis to a "hostile work environment" claim under 42 U.S.C. § 1981). Therefore, this court will generally refer to Title VII in its analysis, but the analysis will apply to all of plaintiff's counts.

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There is no "mathematically precise test" for determining when conduct in the workplace moves beyond the "merely offensive" and enters the realm of unlawful discrimination. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Rather, "all the circumstances" must be examined to determine whether an environment is "hostile" or "abusive," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Landrau-Romero v. Banco Popular De Puerto Rico, 212 F.3d 607, 613 (1st Cir. 2000) (quoting Harris, 510 U.S. at 23). "Subject to some policing at the outer bounds," the jury should weigh the factors and decide whether the harassment was of a kind that would have affected the conditions of employment for a reasonable person. Marrero v. Goya of P.R., Inc., 304 F.3d 7, 19 (1st Cir. 2002) (quoting Gorski v. N.H. Dep't of Corr., 290 F.3d 466, 474 (1st Cir. 2002)). However, "teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." Faragher, 524 U.S. at 788.

Defendants argue that the alleged incidents, if true, do not rise to the level of a hostile work environment as a matter of law. See Defs.' Mem. at 7-11 (arguing that "[a]t best, plaintiff has alleged a total of five incidents" of racial harassment, and that only three "had overtly racial tones"). However, "while a plaintiff must show 'more than a few isolated incidents of racial enmity,' there is no 'absolute numerical standard' by which to determine whether harassment has created a hostile environment." Danco, 178 F.3d at 16 (quoting Snell v. Suffolk County, 782 F.2d 1094, 1103 (2d Cir. 1986); Vance v. Southern Bell Telephone & Telegraph Co., 863 F.2d 1503, 1511 (11th Cir. 1989)); see also Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 427, 437 (2d Cir. 1999) ("[T]here is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability as a matter of law, nor a number of incidents below which a plaintiff fails as a matter of law to state a claim.") (citation omitted). In fact, "even a single episode of harassment, if severe enough, can establish a hostile work environment." Richardson, 180 F.3d at 437 (quoting Torres v. Pisano, 116 F.3d 625, 631 (2d Cir. 1997)).

This court finds that a reasonable jury could find that Wilson was subjected to a hostile work environment. Admittedly, there were only several harassing incidents overall, and only three were overtly racial. However, a claim should not be dismissed on summary judgment simply based on the small number of incidents alone. See Danco, 178 F.3d at 16 (noting that no absolute numerical standard is needed); Richardson, 180 F.3d at 437 (noting that a single episode of harassment, if severe, is enough). Here, the overtly racial comments are particularly severe. First, Orybkiewicz told Wilson that "she slept with monkeys" and "should go back to Africa." After reporting this conduct to management, Wilson was subjected to Deroy's comment regarding the sales display of monkeys that he was "trying to make Otis feel comfortable." While the comment was explicitly directed at Otis, an African American, a reasonable jury could find that it was also directed at Wilson and tends to show a hostile work environment overall. Third, Wilson was subjected to Orybkiewicz's second harassing comment when he asked her if she "ordered something from the nigger network."

These comments, that she "slept with monkeys," should "go back to Africa," likening an African American employee to monkeys in a sales display, and most notably, being asked whether she shopped at the "nigger network," are exactly the types of severe racial comments that one would have hoped this country had moved beyond. While all of the overtly racial comments are undoubtedly offensive, what is most troubling is the use of the word "nigger" in the workplace. "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." Richardson, 180 F.3d at 439 (citation omitted). While the comments here were not made by a supervisor, the use of such a despicable word, by whomever made, undoubtedly affects the workplace in a negative way.

In a case factually similar to the one at bar, and in fact involving less severe incidents of harassment, the First Circuit recently refused to overrule a jury verdict that three "rather tame" racial incidents were sufficient to support a hostile work environment. See Danco, 178 F.3d at 10-11, 16-17. In that case, a Mexican-American independent contractor was subjected to having "White Supremacy" spray painted on a wall, being told that "I don't like your kind ... Puerto

Ricans," and having an unidentified racial slur yelled at him from a passing car. Id. at 10-11. While Danco was brought under § 1981 because the plaintiffs were independent contractors, the hostile work environment analysis is identical to a Title VII claim.

This court finds that the racial comments at bar were much more severe than those in Danco and were not "teasing, offhand comments" such that summary judgment would be appropriate. See Faragher, 524 U.S. at 788. While they may have been "isolated," this court finds that the words chosen were "extremely serious" as to outweigh the small number of incidents. See id. ("teasing, offhand comments, and isolated incidents (unless extremely serious)" are not enough to create a hostile work environment) (emphasis added); Danco 178 F.3d at 16-17 (three "rather tame" incidents of racial harassment sufficient to uphold jury verdict of hostile work environment). Therefore, using Danco as a guide, and taking all the circumstances into account, this court finds that the racial comments were severe, humiliating, and interfered with Wilson's work performance enough that a reasonable jury could find that a hostile work environment exists.<sup>5</sup>

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<sup>5</sup> In its hostile work environment analysis, the court could also examine the non-overtly racial comments directed at Wilson. See Landrau-Romero, 212 F.3d at 614 ("Alleged conduct that is not explicitly racial in nature may, in appropriate circumstances, be considered along with more overtly discriminatory conduct in assessing a Title VII harassment claim.") (citation omitted); Jackson v. Quanax Corp., 191 F.3d 647, 662 (6th Cir. 1999) ("Even though a certain action may not have been specifically racial in nature, it may contribute to the plaintiff's proof of a hostile work environment if it would not have occurred but for the fact that the plaintiff was African American. Indeed, a showing of the use of racial epithets in a work environment may create an inference that racial animus motivated other conduct as well.") (citations and internal quotation marks omitted). Wilson claims that racial animus motivated the non-overtly racial conduct here. However, because the court finds the overtly racial comments sufficient to defeat a summary judgment motion, it need not engage in an analysis of the other incidents at this time.

It should also be noted that this court did not rely on the Porritt affidavit in reaching its conclusion. Porritt's affidavit, notably unsigned, chronicles alleged racial harassment that he was subjected to at Burlington. Burlington disputes whether the court

The cases cited by defendants do not convince the court otherwise. Defendants first cite Alfano v. Costello, which is distinguishable because it is a sexual harassment case where four sex-based harassing incidents (out of a total of twelve alleged incidents) occurred over a five-year span. Alfano v. Costello, 294 F.3d 365, 378-79 (2d Cir. 2001). In the case at bar, however, the alleged comments occurred over a much shorter period of time, approximately four months. Further, the sex-based incidents in Alfano were not as severe as the race-based comments at bar.

Defendants next cite Celestine v. Petroleos de Venezuela SA, where the Fifth Circuit held that eight incidents of alleged racial harassment in a twenty-five month period were insufficient to support a hostile work environment claim. Celestine v. Petroleos de Venezuela SA, 266 F.3d 343, 354 (5th Cir. 2001). While the time frame involved in Celestine is distinguishable because it was approximately six times the time frame here, the case at least provides defendants with an argument. This court, however, is not bound to the case law of another circuit. As noted above, this case is closely analogous to the First Circuit's opinion in Danco, even more so than to Celestine. Therefore, this court elects to follow Danco and finds Celestine unpersuasive.

Defendants then cite Richardson v. N.Y. State Dept. of Corr. Ser., which held that where only three of fifteen incidents had overtly racial tones, the allegations were insufficient as a matter of law to support a hostile work environment claim. Richardson, 180 F.3d at 440. What defendants neglect to point out, however, is that Richardson contained two holdings for two separate work locations. First, Richardson held that a reasonable jury could find a hostile work environment existed where African American employees were referred to as "apes or baboons," "light-skinned nigger," "nigger," and that African Americans are "so dark you cannot see them anyway." Richardson, 180 F.3d at 438-40. The racial comments made under this part of the Richardson case are similar to the comments made in the case at bar. Therefore, the first holding is similar to the

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can examine Porritt's alleged experiences. See Defs.' Reply Mem. at 4-5 (citing cases). The court, however, need not address the Porritt affidavit because the summary judgment motion can be denied on Wilson's allegations alone.

conclusion reached by this court. Needless to say, defendants neglected to cite Richardson's first holding.

Richardson's second holding, the one that defendants cite and which derived from activities at a second work location, was that three comments, with slight racial overtones, were not enough to survive summary judgment on a hostile work environment claim. Id. at 440. One comment was a disparaging remark about Native Americans, one was that all "Black inmates looked alike," and finally that "Jewish people 'like to hold on to their money.'" The Richardson court rejected the claim that these comments were serious enough to uphold a hostile work environment claim. The court was particularly skeptical about the claim because only one of the comments even referred to the plaintiff's racial category, African American. The second holding from Richardson is distinguishable from the case at bar because the comments directed at Wilson were much more severe and were all directed towards her racial category. Therefore, the proposition for which the defendants cite Richardson is unpersuasive.

Finally, defendants cite Carter v. Bell. The facts of Carter, however, do not resemble the facts in the case at bar in the slightest. Carter v. Ball, 33 F.3d 450 (4th Cir. 1994). In Carter, the employee charged that he was reprimanded in front of all the other employees while white employees were reprimanded in the supervisor's office and that a gorilla poster hanging in the supervisor's office was racially derogatory. Unlike the case at bar, no overtly racial comments were made or explicitly directed at the plaintiff in Carter. Here, the highly offensive comments made directly at Wilson take it far outside the holding of Carter. Therefore, this court finds Carter unpersuasive.

#### B. Employer Liability

Even if Wilson's claims rise to the level of a hostile work environment, she still must establish employer liability. A plaintiff must satisfy different standards for employer liability in a hostile work environment case depending on whether the harasser is a supervisor or a co-employee of the victim. See Crowley v. L.L. Bean, Inc., 303 F.3d 387, 401 (1st Cir. 2002). Here, it is beyond dispute that most of the alleged racial comments, and certainly the overtly racial comments, derived from Wilson's co-workers. "To establish employer liability for a non-supervisory co-employee, a

plaintiff must demonstrate that the employer 'knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate action.'" Crowley, 303 F.3d at 401 (quoting White v. N.H. Dep't of Corr., 221 F.3d 254, 261 (1st Cir. 2000)).<sup>6</sup>

1. Whether Burlington Knew or Should Have Known

It is undisputed that plaintiff reported Orybkiewicz's alleged comments, that Wilson "slept with monkeys" and "should go back to Africa," to her manager, Lefebvre, shortly after the comments were made. See Defs.' Local Rule 12.1 Statement at ¶ 8. It is also undisputed that plaintiff reported other alleged comments, going as far as to request a meeting with Ricard, the district manager. As such, Wilson has provided sufficient evidence for a reasonable jury to find Burlington knew or should have known of the alleged discriminatory conduct.

2. Whether Burlington Took Prompt and Appropriate Action

Employers are not held to be prescient in their ability to foresee and prevent all harassment. Thus, it is "unrealistic to expect management to be aware of every impropriety committed by every low-level employee." Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1035 (7th Cir. 1998) (citation omitted). However, once an employer has notice of a complaint of harassment, it must institute prompt and appropriate remedial action. See Crowley, 303 F.3d at 401. The "law does not even require that the employer's actions prevent harassment, but merely that its response [be] reasonably likely to prevent future harassment." Parkins, 163 F.3d at 1036.

Here, defendants claim that Burlington's response to Wilson's allegations was sufficient to avoid employer liability as a matter of law. First, Burlington claims that it monitored the interactions between Wilson and Orybkiewicz after Wilson first complained about Orybkiewicz's comments. See Defs.' Mem. at 12, n.6 (noting that "Lefebvre subsequently approached Plaintiff and asked if she was having a problem

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<sup>6</sup> Employers are held presumptively liable in cases where the harassment is perpetrated by a supervisor. See Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

with Orybkiewicz"). Burlington also points out that Wilson never filed a formal complaint against Orybkiewicz. See id. at n.6. Further, Burlington fired Orybkiewicz immediately after Wilson reported him for the second time, and Burlington fired Deroy five days after his harassing comments. See id. at 12 (arguing that "termination is the most severe penalty an employer may mete out"). Burlington also notes that Ricard, the district manager, met with Wilson shortly after she requested a meeting and offered to transfer her during that meeting.

Plaintiff, however, argues that after she reported the first incident of racial harassment by Orybkiewicz, Lefebvre "refused to take and/or implement remedial measures." Pltf.'s Mem. at 1. Plaintiff asserts that Burlington did not follow its own harassment policy by not investigating the matter. Plaintiff agrees that Ricard, the district manager, offered to transfer her after their first meeting, see id. at 2, but argues that "[a]n offer to transfer approximately 3 months after the first incident and after the Plaintiff had complained on at least 3 occasions does not constitute, under any interpretation of the law, a prompt, appropriate or remedial response to prevent or remedy workplace harassment." Id. at 14.

Taking the evidence in the light most favorable to plaintiff, this court finds that a reasonable jury could find that Burlington's response was unreasonable. First, there is a material issue of fact as to whether monitoring occurred and what that monitoring entailed. Lefebvre checked with Wilson once, but notably, there is no indication that Orybkiewicz was told to stop the harassing conduct, reprimanded in any way, or even spoken to by Burlington management after Wilson reported the first incident. See generally App. to Defs.' Mem., Tab A, Ricard Depo.; Tab B, Lefebvre Depo.; Tab C, O'Hare Depo. (all lacking any indication that Burlington management spoke to Orybkiewicz in any way regarding the first allegation). The fact that no evidence exists, at least at this juncture, that Burlington spoke with Orybkiewicz in any way after the first incident is curious given the fact that Burlington has a zero tolerance policy regarding harassment in the workplace.

In fact, the cases cited by defendant stress the importance of speaking to the alleged harasser and asking them to stop the alleged harassing conduct. See Defs.' Mem. at 11 (citing Star v. West, 237 F.3d 1036 (9th Cir. 2000); Curry v.

District of Columbia, 195 F.3d 654 (D.C. Cir. 1999)). In both Star and Curry, a major part of the responses taken by the employers was to speak with the alleged harassers and ask those persons to stop. Star, 237 F.3d 1036; Curry, 195 F.3d 654. In the case at bar, however, there is no evidence that anyone from Burlington spoke with Orybkiewicz after the first allegation or asked him to stop any harassing conduct. The only measure taken by Burlington before the second comment was made was to "monitor" the situation and ask Wilson if she was alright. Again, there is a dispute as to what that "monitoring" entailed. Therefore, defendants' cases are distinguishable and not persuasive in this case.<sup>7</sup>

Defendants argue, however, that the fact that Burlington fired Orybkiewicz after his second comment and Deroy five days after his comment make Burlington's response reasonable. Undoubtedly, there is no greater step that Burlington could have taken to end the alleged harassment of particular employees. The court is concerned, however, about Burlington's response between the first incident of racial harassment and the second and third incidents which lead to

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<sup>7</sup> Employers are often put between a rock and a hard place when an employee makes an allegation of harassment, particularly when the alleged harasser denies the incident. What is an employer to do? Does the employer take the victim's word unconditionally and fire the alleged harasser immediately? Or, should the employer "monitor" the situation or move employees' shifts, jobs, etc., all of which involve time, money, and disruption of business. This is not to say that harassment is acceptable, but it is just an acknowledgment that employers face tough decisions when confronted with an employee who denies allegations of harassment. The point of this exercise is not entirely academic, it is to note that the court does not know what Orybkiewicz's response to the allegations were. Orybkiewicz has not been deposed in the matter and there is no indication management spoke to him at any time regarding the allegations. Therefore, it is difficult for the court to determine whether Burlington's response to Orybkiewicz's first comment was reasonable. Had Orybkiewicz denied the alleged comments, perhaps Burlington may have had to do slightly less in order to be reasonable. Had Orybkiewicz admitted the allegations or had management definitely known that the comments were made, then Burlington would obviously have to do more in order to be reasonable to prevent harassment in the future. When taken in light of all the circumstances, these uncertainties support the court's conclusion that this issue is not one to be decided on summary judgment.

the firings. Further, it is disputed whether Orybkiewicz was fired because of the racial conduct, and Burlington admits that Derooy was not fired for his racial comments. See Defs.' Mem. at 4. While the reasons for the firings are not dispositive, they do add to the totality of the circumstances for summary judgment purposes. Therefore, taking the evidence in the light most favorable to the plaintiff, this court finds that defendants' motion should be denied as to employer liability.

### C. Constructive Discharge

After working for approximately four months, Wilson left Burlington in March of 1999, and after ten weeks of medical leave, tendered her resignation effective June 1, 1999. Wilson claims that she was constructively discharged in March of 1999 because of "Burlington's failure to implement remedial measures to address Plaintiff's discriminatory work environment." Pltf.'s Mem. at 2.

To maintain her constructive discharge claim, Wilson must "show that her working conditions were 'so difficult or unpleasant that a reasonable person in [her] shoes would have felt compelled to resign.'" Marrero, 304 F.3d at 28 (quoting Alicia Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977)). "The standard is an objective one; it cannot be triggered solely by the employee's subjective beliefs, no matter how sincerely held." Id. (citations and internal quotation marks omitted); see also Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561 (1st Cir. 1986) ("[T]he law does not permit an employee's subjective perceptions to govern a claim of constructive discharge.") (citation and internal quotation marks omitted). "The workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins - thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world." Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. 2000). Therefore, the standard for proving a constructive discharge claim is greater than that required to show merely a hostile work environment. "[T]he fact that the plaintiff endured a hostile work environment - without more - will not always support a finding of constructive discharge." Merrero, 304 F.3d at 28 (citing Landgraf v. USI Films Prods., 968 F.2d 427, 430 (5th Cir. 1992) ("To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to

prove a hostile working environment.")).

This court finds that plaintiff cannot meet the heightened standard of a constructive discharge claim as a matter of law. While the overtly racial comments that Wilson was subjected to were not the "ordinary slings and arrows that workers routinely encounter," the persons who made those comments were fired several months before plaintiff was allegedly constructively discharged on March 23, 1999. The comments that were made to Wilson after Orybkiewicz and Deroy were fired were not overtly racial and could qualify as the "ordinary slings and arrows" of the workplace and were not necessarily racially motivated. These allegations alone certainly do not go above and beyond a hostile work environment claim, which is the burden that plaintiff carries. See Merrero, 304 F.3d at 28 (citing Landgraf, 968 F.2d at 430). Therefore, defendants' motion should be granted as to the constructive discharge claim.

#### D. Retaliation

Plaintiff makes a claim of retaliation under the rubric of her Title VII and § 1981 claims. "To establish a prima facie case of retaliation, a plaintiff must prove that '(1) she engaged in protected conduct under Title VII; (2) she suffered an adverse employment action; and (3) the adverse action is causally connected to the protected activity.'" Dressler v. Daniel, No. 01-2569, 2003 U.S. App. LEXIS 247, at \*5 (1st Cir. Jan. 9, 2003) (quoting White, 221 F.3d at 262). Defendants, however, did not argue against a retaliation claim in their motion for summary judgment or memorandum of law. This court will not address the issue even if there is an implicit objection to the retaliation claim in defendants' pleadings because "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.") (citations omitted). Therefore, defendants' motion should be denied as to any claim for retaliation.

#### Conclusion

For the reasons stated, I recommend that the district court deny defendants' motion for summary judgment as it

relates to hostile work environment, employer liability, and retaliation, and grant defendants' motion as it relates to constructive discharge. Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. Fed. R. Civ. P. 72(b); Local Rule 32. Failure to file specific objections in a timely manner constitutes a waiver of the right to review by the district court and the right to appeal the district court's decision. United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1990).

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Robert W. Lovegreen  
United States Magistrate Judge  
January 21, 2003